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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

**No. 193**

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,

*Petitioner,*

*v.*

D. C. TRANSIT SYSTEM, INC.,

*Respondent.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR RESPONDENT IN OPPOSITION

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## BRIEF FOR RESPONDENT IN OPPOSITION

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The Washington Metropolitan Area Transit Commission ("Commission") has filed with this Court a Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit ("Petition") to review a final decision setting aside Commission Order No. 581 which directed Alexandria, Barcroft and Washington Transit Company, Inc. ("ABW") and W. M. A. Transit Company ("WMA") to extend certain of their routes into areas already being served by, and over routes already being operated by, Respondent, D. C. Transit System, Inc. ("Transit"), without having found that public convenience and necessity required such extensions or otherwise complying with Section 4(e), Article XII, Title II, of the Washington Metropolitan Area Transit Regulation Compact, Public Law 86-794, 74 Stat. 1031 (1960), 1 D.C. Code §§ 1410-16 (1961 ed.) ("Compact")[1] and without complying with the provisions of Transit's Congressional Franchise, Public Law 84-757, 70 Stat. 598 (1956) ("Franchise").

## QUESTIONS PRESENTED FOR REVIEW

The questions to be reviewed by this Court, if a writ of certiorari is issued in this case, are as follows:

1. Whether the Court of Appeals for the District of Columbia Circuit (the "Court of Appeals") erred in its finding that the certificates of public convenience and necessity issued to ABW and WMA by the Commission ("grandfather certificates") pursuant to Section 4(a) of the Compact, which provides for the issuance of such certificates to any carrier "bona fide engaged in transportation . . . on the effective date of [the Compact] . . . without requiring further proof that public convenience and necessity will be served by such operation . . . : ", authorized ABW and WMA

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[1] Unless otherwise indicated, all citations to the Compact are to Article XII, Title II.

only to render such service as they were actually performing on the effective date of the Compact.

2. Whether the Court of Appeals, having found that ABW and WMA did not have the authority under their grandfather certificates to render any service not actually performed on the effective date of the Compact, erred in its finding that the Commission did not have the power to require such carriers to extend their service beyond that rendered on the effective date of the Compact without complying with Section 4(e) of the Compact, the source of the Commission's power to require the extension of such service.

## STATEMENT OF THE CASE

On May 25, 1965, the Commission ordered a hearing upon the "propriety and reasonableness" of the extension of certain routes of ABW and WMA from their then terminals at 11th and 12th Streets and Pennsylvania Avenue, N.W., into areas already being served by, and over routes already being operated by, Transit ("Route Extensions").

By Order No. 581, served March 25, 1966 (Petition, pp. A9-A27), the Commission found that service by ABW and WMA over the Route Extensions would be in the public interest and authorized and directed ABW and WMA to extend their routes to render such service. In such order, the Commission held that the grandfather certificates issued to ABW and WMA by the Commission pursuant to Section 4(a) of the Compact authorized such carriers to go anywhere in the District of Columbia ("District") that the Commission thought desirable[2] and, therefore, the Commission determined that it was not required to comply with Section 4(e) of the Compact, the statutory authority for the Commission

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[2]The Commission's Staff witness testified that ABW and WMA have the authority under their grandfather certificates to provide service over every one of Transit's routes (R. 559).

"R." refers to the two-volume Joint Appendix in the Court of Appeals.

to require carriers to extend their services. Accordingly, the Commission (a) did not find that public convenience and necessity required the Route Extensions, (b) did not find that Transit's service over the routes and to the areas to be served by the Route Extensions was inadequate, and (c) did not afford Transit the opportunity to remedy any alleged inadequacy.

The Commission also found that it was not required to comply with Section 3 of Transit's Franchise,[3] which prohibited the establishment of service competitive to that of Transit unless such competitive service was necessary for the public convenience on the ground that the service to be rendered by ABW and WMA was interstate in nature and therefore not competitive with Transit's intra-District operations.

On May 18, 1966, Transit filed a Petition for Review of Commission Order No. 581 with the Court of Appeals asserting, among other things, that:

(1) The Commission erred in holding that the existing certificates of public convenience and necessity of ABW and WMA authorize them to serve the Route Extensions.

(2) The Commission erred in ordering ABW and WMA to serve the Route Extensions without amendment to their respective certificates of public convenience and necessity or the issuance of new certificates in accordance with all the provisions of Section 4(e) of the Compact.

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[3] Transit's rights under the Franchise were preserved by Section 3 of the Joint Resolution of Congress consenting to and approving the Compact, which provides in part:

> "That nothing in this Act or in the compact consented to and approved hereby shall impair or affect the rights, duties, and obligations created by the Act of July 24, 1956 (ch. 669, 70 Stat. 598), granting a franchise to D. C. Transit System, Inc." Public Law 86-794, 74 Stat. 1031, 1050 (1960), 1 D.C. Code § 1412 (1961 ed.).

(3) The Commission erred in ordering ABW and WMA to serve the Route Extensions without complying with Section 3 of Transit's Franchise.

(4) The Commission erred in issuing orders requiring ABW and WMA to serve the Route Extensions because such orders were not supported by substantial evidence in the record.

(5) The issuance of orders by the Commission requiring ABW and WMA to serve the Route Extensions and the procedures followed in connection therewith deprived Transit of its constitutional rights to substantive and procedural due process.

In a unanimous opinion filed March 7, 1967, the Court of Appeals set aside Commission Order No. 581 because the Commission had failed to act "in conformity with the statutory requirements and by reference to the statutory standards" (Petition, p. A8). In so doing, the Court of Appeals considered two separate issues and divided its opinion into two parts, each part considering and disposing of one of such issues.

In the first part of its opinion, the Court of Appeals considered whether or not ABW and WMA had the authority under their respective grandfather certificates to extend their service in the District beyond the terminals at 11th and 12th Streets and Pennsylvania Avenue, N.W. The Court of Appeals found that, on the effective date of the Compact, ABW and WMA furnished transportation from Virginia and Maryland, respectively, to such terminals in the District and no further. Accordingly, the Court of Appeals held that by statutory definition and on the basis of decisions of this Court and of its own decisions, the grandfather certificates could authorize no service in the District extending beyond such terminals and that the grandfather certificates did not purport to authorize service extending beyond such terminals (Petition, pp. A2-A4).

Having found that ABW and WMA did not have the authority under their respective grandfather certificates to

serve the Route Extensions, the Court of Appeals, in the second part of its opinion, considered whether or not the Commission had the power to require them to extend their services over the Route Extensions without complying with Section 4(e) of the Compact. The Court of Appeals found that the source of the Commission's power to require the extension of such service was set forth in Section 4(e) of the Compact and that service by ABW and WMA over the Route Extensions would be competitively adverse to Transit. On the basis of these findings, the Court of Appeals held that the Commission could not extend the routes of ABW and WMA in the District without complying with Section 4(e) of the Compact (Petition, pp. A4-A8).[4]

In so holding, the Court of Appeals rejected the contention of the Commission that it was not required to comply with Section 4(e) of the Compact because it had succeeded to the authority of the Interstate Commerce Commission ("ICC") and its other predecessor regulatory agencies, which, the Commission alleged, could have required ABW and WMA to extend their services without making the determinations required by Section 4(e). The Court of Appeals ruled that the authority which the predecessor regulatory agencies might have exercised prior to the Franchise and the Compact is not the measure of the Commission's present authority (Petition, pp. A5-A7).

On April 13, 1967, the Court of Appeals denied the Commission's petition for rehearing en banc.

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[4]The Court of Appeals stated that it did not need to decide whether Section 3 of Transit's Franchise provided Transit with any greater protection from competition than that contained in Section 4(e) of the Compact. The Court of Appeals noted that the Joint Resolution of Congress consenting to and approving the Compact specifically provided that nothing in the Compact would impair the rights of Transit under the Franchise. (Petition, p. A6, n. 5).

## ARGUMENT

### I

### THE COMMISSION DOES NOT ESTABLISH ANY GROUNDS FOR THE ISSUANCE OF A WRIT OF CERTIORARI

The Commission has not shown in the Petition that any of the reasons which determine whether a writ of certiorari will be issued are present in this case. U.S. Sup. Ct. Rule 19, 28 U.S.C.

The Petition alleges, as reasons for this Court to issue a writ of certiorari in this case, (a) that the decision of the Court of Appeals violates basic principles of judicial review; (b) that the decision of the Court of Appeals is in conflict with applicable principles of law laid down by this Court and followed by the courts of appeals for other circuits; and (c) that there are "special and important reasons" warranting review of the decision of the Court of Appeals.

#### A.

#### The decision of the Court of Appeals is consistent with basic principles of judicial review

The Commission alleges that the Court of Appeals violates basic principles of judicial review because, in setting aside Commission Order No. 581, the Court of Appeals (1) does not state or show that the construction by the Commission of the grandfather certificates issued to ABW and WMA was arbitrary, capricious or clearly erroneous; (2) goes "behind" the language of the grandfather certificates issued to ABW and WMA in ruling upon their scope; and (3) makes findings contrary to the determination of the Commission, allegedly supported by substantial evidence in the record, that the Route Extensions would have no substantial adverse economic effect upon Transit. As hereinafter shown, the Commission fails to substantiate any of the above grounds it re-

lies on for its allegation that the Court of Appeals has violated basic principles of judicial review and, therefore, such allegation does not constitute a basis for the issuance of a writ of certiorari in this case.

**1. The Court of Appeals finds that the construction by the Commission of the grandfather certificates was clearly erroneous**

The Commission states that the Court of Appeals "neither stated that the Commission's ruling [in Order No. 581] was arbitrary, capricious, or clearly erroneous nor spelled out any theory why this might be the case" (Petition, p. 10). Accordingly, the Commission maintains that, in setting aside the Commission's interpretation in Order No. 581 of the grandfather certificates issued to ABW and WMA, the Court of Appeals has violated basic principles of judicial review.

Although the Court of Appeals may not have used the words "clearly erroneous" in its decision, the Court of Appeals does find that the Commission's interpretation of the grandfather certificates issued to ABW and WMA to authorize such carriers to serve the Route Extensions has no basis in fact or law for the following reasons:

(a) Section 4(a) of the Compact, the statutory authority for the issuance of the grandfather certificates to ABW and WMA, provides that grandfather certificates will be issued for transportation "bona fide engaged in" on the effective date of the Compact (Petition, p. A3).

(b) It is well established law that "bona fide" engagement in transportation for the purpose of "grandfather clauses" similar to Section 4(a) of the Compact requires proof of actual, and not potential, operations (Petition, p. A4, n. 2).

(c) There is no reason to suppose that Congress read the Compact language of "bona fide engaged in transportation . . . on the effective date of [the Compact]" in any manner contrary to the established law applicable thereto (Petition, p. A4, n. 2).

(d) Neither ABW nor WMA provided service over the Route Extensions or to the area served thereby on the effective date of the Compact (Petition, p. A4).

(e) The applications for grandfather certificates filed by ABW and WMA pursuant to Section 4(a) of the Compact were for certificates "authorizing continuance of operations being conducted on the effective date of the Compact" (Petition, p. A3; Ex. 88, R. 295).

(f) The Commission order issuing the grandfather certificates to ABW and WMA states that the only issue considered by the Commission was whether or not ABW and WMA were "bona fide engaged in transportation . . . for which authority was sought" on the effective date of the Compact (Petition, pp. A2-A4; Ex. 88, R. 296).

It is clear from the foregoing that the Court of Appeals found that the ruling of the Commission in Order No. 581 that the grandfather certificates issued to ABW and WMA authorized service over the Route Extensions was in error. The decision by the Court of Appeals to set aside such ruling of the Commission does not violate basic principles of judicial review. *Nelson, Inc. v. United States,* 355 U.S. 554 (1958).

**2. The Court of Appeals does not ignore the plain language of the grandfather certificates**

The Commission states "that the Court of Appeals erred in failing to follow the principles of judicial review. . . which require that the rights of the carrier be determined by the language of the certificate. . . ." (Petition, p. 12). The Commission maintains that the Commission's interpretation of the scope of the language of the grandfather certificates was rejected by the Court of Appeals on the "erroneous theory that the actual operations prior to issuance" of the grandfather certificates to ABW and WMA determined the scope of the authority granted (Petition, p. 16).

A careful review of the opinion of the Court of Appeals shows that there is no basis for the allegation by the Commission in the Petition that the Court of Appeals ignored and looked beyond the plain language of the grandfather certificates. The Court of Appeals merely holds that the interpretation by the Commission of the grandfather certificates issued to ABW and WMA to authorize service not actually performed on the effective date of the Compact is inconsistent with applicable law. Such holding is required by the decisions of this Court. *E.g., United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475 (1942). Such holding, therefore, does not violate basic principles of judicial review.

**3. The decision of the Court of Appeals is consistent with basic principles of judicial review even if the Court of Appeals considers such circumstances surrounding the issuance of the grandfather certificates as were considered by the Commission**

Assuming, *arguendo*, that the Court of Appeals had considered matters beyond the plain language of the grandfather certificates issued to ABW and WMA, the decision of the Court of Appeals would not violate basic principles of judicial review.

**(a) The Commission found it necessary to consider matters beyond the plain language of the grandfather certificates**

The Commission, in determining the scope of the operating authority granted by the grandfather certificates issued to ABW and WMA, found it "necessary to consider the circumstances surrounding their issuance" (Commission Order No. 581, Petition, pp. A12-A15).

The Commission, having considered matters beyond the plain language of the grandfather certificates issued to ABW and WMA in determining the scope of the operating authority granted thereby, cannot preclude the Court of Appeals from doing likewise. It is clear that there can be no meaningful review of the validity of the Commission's construction of the grandfather certificates unless the Court of

Appeals considers the bases for such construction. The Commission, having deemed it necessary to consider "the circumstances surrounding" the issuance of grandfather certificates, the Court of Appeals is required to consider and review such circumstances. *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

**(b) Consideration by the Court of Appeals of the operating authority of ABW and WMA prior to issuance of grandfather certificates is not for the purpose of determining the scope of such authority**

The findings of the Court of Appeals concerning the operating authority of ABW and WMA prior to the effective date of the Compact are not for the purpose of determining the scope of such authority but only for the purpose of determining the regulatory power and practice in designating routes and termini in the District then in effect (Petition, pp. A5-A7).

It was necessary for the Court of Appeals to consider the practice of the predecessor regulatory agencies because the Commission asserted that it had succeeded to their jurisdiction and could, therefore, treat ABW and WMA as having the authority to go anywhere in the District on the ground that their grandfather certificates paralleled the language of those carriers' prior ICC certificates and that the prior ICC certificates granted such broad authority (Petition, pp. A5-A7). The Court of Appeals rejects this assertion of the Commission and holds that regardless of the powers which the ICC had, the Commission's powers are limited to those granted by the Compact (Petition, pp. A6-A7).

In any event, the Commission's assertion that the ICC certificates authorized ABW and WMA to go anywhere in the District is in error. The Commission's claim that ICC certificates to serve "Washington, D.C." grant authority to serve any point or go over any route in the District has been rejected by the District Court for the District of Columbia and the Public Utilities Commission of the District

of Columbia ("PUC")[5] in determining issues identical to those raised by the Commission.[6] Clearly, under the regulatory practice in effect prior to the enactment of the Compact, ABW and WMA were subject to the authority and control of the PUC and a Joint Board made up of the PUC and the District Commissioners for the designation of street routings and termini.

(c) The Court of Appeals does not collaterally attack the grandfather certificates

A careful review of the opinion of the Court of Appeals shows that there is absolutely no basis for the further allegation by the Commission in the Petition that the decision of the Court constitutes a collateral attack upon the grandfather certificates.

The Court of Appeals does not review, or even consider, the validity of the grandfather certificates. The Court merely holds that the interpretation by the Commission of the grandfather certificates issued to ABW and WMA, subsequent to the issuance thereof, to authorize service not actually performed on the effective date of the Compact is inconsistent with applicable law (Petition, pp. A2-A4, A6-A8). This holding does not constitute a collateral attack upon the grandfather certificates.

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[5] Now the Public Service Commission of the District of Columbia.

[6] *Capital Transit Co. v. Riley E. Elgen,* Civil Action No. 971, D. D.C., January 19, 1939; *Oriole Motor Coach Co. v. Public Utils. Comm'n,* 111 F. Supp. 621 (D. D.C. 1953), *aff'g Oriole Motor Coach Lines, Inc.,* 95 P.U.R. (n.s.) 188 (D.C. Pub. Utils. Comm'n, 1952); District of Columbia Pub. Utils. Comm'n Order No. 3368, April 26, 1948. See also *Capital Transit Co. v. Safeway Trails, Inc.,* 201 F.2d 708, 709 (D.C. Cir. 1953).

**4. The Court of Appeals correctly rejects the findings of the Commission that the Route Extensions would not have an adverse financial impact on Transit**

The Commission states that the finding of the Court of Appeals that the Route Extensions will have a substantial financial impact on Transit is contrary to the Commission's determination which, the Commission alleges, is supported by substantial evidence in the record (Petition, pp. 16-18). Accordingly, the Commission maintains that the finding of the Court of Appeals is contrary to the principles of administrative law and violates the basic principles of judicial review.

The Commission's finding that the Route Extensions will not have a substantial economic effect upon Transit is directly contrary to the only evidence in the record before the Commission concerning the losses which Transit might sustain from the then existing joint fare arrangements (Ex. 33, R. 107; R. 554-55, 616-19, 621-22, 632, 635-36, 672-75). This evidence shows that the projected annual decrease in Transit's revenues resulting from service by ABW and WMA over the Route Extensions would amount to between $130,000 and $600,000.[7]

In any event, it is the fact of the potential loss of revenue and not the actual amount of the projected loss which is material to the finding by the Court of Appeals that the Route Extensions would have a financial impact upon and

[7]If all 1,413 ABW and WMA passengers who indicated in the Commission's survey that their destination was in the area of the Route Extensions (Petition, pp. A17 - A20) were to use the new service provided by ABW and WMA instead of transferring to Transit vehicles, the loss of revenue to Transit, based on the 17½¢ joint-fare in each direction, would be approximately $500 per working day, or $130,000 per year. The amount of $600,000 is based on the estimate by a Transit witness that 80 to 90 per cent of the passengers transferring to Transit from ABW and WMA have as their destination the area served by the Route Extensions.

be competitively adverse to Transit. *Oriole Motor Coach Co. v. Public Utils. Comm'n, supra; Capital Transit Co. v. Riley E. Elgen, supra.*

Thus, the Court of Appeals does not violate basic principles of judicial review in concluding that service by ABW and WMA over the Route Extensions would have a financial impact upon Transit which the Commission was required to consider under Section 4(e) of the Compact before directing ABW and WMA to serve the Route Extensions.

## B.

## The decision of the Court of Appeals does not create a conflict with decisions of this Court or of courts of appeals for other circuits

The Commission alleges that the decision of the Court of Appeals, in setting aside Commission Order No. 581, conflicts with applicable principles of law laid down by this Court and followed by other courts of appeals because the Court of Appeals (1) collaterally attacks the grandfather certificates issued to ABW and WMA by questioning their validity; and (2) considers matters beyond the plain language of such grandfather certificates in determining the scope of the authority granted thereby. As hereinafter shown, the Commission fails to substantiate any of the above grounds it relies on for its allegation that the decision of the Court of Appeals conflicts with decisions of this Court and of other courts of appeals and, therefore, such allegation does not constitute a basis for the issuance of a writ of certiorari in this case.

### 1. The decision of the Court of Appeals does not collaterally attack the grandfather certificates

As has been shown at page 11, *supra*, the Court of Appeals does not review, or even consider, the validity of the grandfather certificates issued to ABW and WMA. There is, therefore, absolutely no basis for the allegation by the Commission that the decision of the Court of Appeals constitutes

a collateral attack on such grandfather certificates. Accordingly, such decision does not conflict with the decisions in the cases cited in the Petition holding that the validity of grandfather certificates may only be questioned in the proceeding in which they were issued.

**2. The decision of the Court of Appeals determining the scope of authority granted by the grandfather certificates does not improperly consider any matters beyond the plain language thereof**

As has been shown at pages 8-9, *supra*, the Court of Appeals did not consider matters beyond the plain language of the grandfather certificates issued to ABW and WMA in determining the scope of the authority granted thereby.

Assuming, *arguendo*, that the Court of Appeals had considered matters beyond the plain language of the grandfather certificates issued to ABW and WMA, the decision of the Court of Appeals does not conflict with the policy established by this Court or with decisions of other courts of appeals. The Court of Appeals, if it considered such matters, was compelled to do so by the Commission because the Commission held in Order No. 581 that it was necessary for the Commission to "consider the circumstances surrounding" the issuance of the grandfather certificates to construe the authority granted to ABW and WMA. *SEC v. Chenery Corp., supra.* (See pp. 9-11, *supra*).

The decision of the Court of Appeals on the scope of authority granted by the grandfather certificates does not conflict with the decisions of this Court or of other courts of appeals cited by the Commission in the Petition. In none of the cases cited by the Commission as authority for its allegation that such conflict exists had the regulatory agency found it necessary to consider the circumstances surrounding the issuance of the certificate at issue.

There is, therefore, no basis for the allegation that in its decision the Court of Appeals improperly considers matters beyond the plain language of the grandfather certificates thereby creating a conflict with decisions of this Court or of other courts of appeals.

**3. Even if there were a difference between the decision of the Court of Appeals and decisions of this Court or of courts of appeals for other circuits, there is no basis for the issuance of a writ of certiorari**

Assuming, *arguendo*, that there were a difference between the decision of the Court of Appeals and those decisions holding that grandfather certificates must be construed by reference only to their plain language in proceedings other than those in which such certificates were issued, a writ of certiorari should not be issued in this case.

Mr. Justice Harlan has stated that:

> "[D]ifferences between the Courts of Appeals in two or more circuits will not be accepted as a conflict [to warrant review on writ of certiorari] if they can fairly be accounted for on the basis of variations in the factual situations among the cases involved."[8]

This case involves special facts applicable to it alone. The following factors, present in this case, were present in none of the cases upon which the Commission relies in order to establish a conflict:

> (1) This case involves the interpretation of the authority granted by an interstate compact to a regulatory agency which succeeded to the jurisdiction exercised by the ICC and three state regulatory agencies.
>
> (2) This case involves the interpretation of grandfather certificates issued under an interstate compact to perpetuate operations conducted pursuant to authority granted by the ICC and state regulatory agencies.

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[8] *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austl. L.J. 108, 111-112 (1959); *Manning the Dikes – Some Comments on the Statutory Certiorari Jurisdiction and Jurisdictional Statement Practice of the Supreme Court of the United States*, 13 Record of N.Y.C.B.A. 541, 552 (1958).

(3) This case involves a situation where the regulatory agency, in its own determination of the extent of the operating authority granted by its grandfather certificates issued to two carriers, itself found it "necessary to consider the circumstances surrounding their issuance" (Commission Order No. 581, Petition, p. A12).

These factors distinguish this case from the cases relied upon by the Commission to establish a conflict of decisions. If there were a difference between the decision of the Court of Appeals and this Court or other courts of appeals, such difference is due to the foregoing variations in the factual situation. According to Mr. Justice Harlan, this Court will not accept such difference as a conflict among courts of appeals and, therefore, a writ of certiorari should not be issued in this case.

## C.

## There are no special and important reasons warranting the issuance of a writ of certiorari

The Commission fails to sustain its allegation in the Petition that there are "special and important reasons" warranting the issuance of a writ of certiorari to the Court of Appeals in this case. Rule 19 of the Rules of this Court provides that writs of certiorari will be granted to review a decision of a court of appeals only where there are "special and important reasons therefor" and specifies what constitutes such reasons in paragraph 1(b) of the Rule. U.S. Sup. Ct. Rule 19, 28 U.S.C. Thus, to allege that "special and important reasons" warrant the issuance of a writ of certiorari is to allege that one or more of the reasons set forth in paragraph 1(b) of Rule 19 are present and no more.

As has been shown above, the decision of the Court of Appeals setting aside Commission Order No. 581 neither violates principles of judicial review nor does it conflict

with decisions of this Court or of other courts of appeals (See pp. 6-16, *supra*). The Commission does not allege that any of the other reasons characterized by this Court as being "special and important" in Rule 19 are present in this case. The attempt by the Commission to put the onus on this Court for any inconvenience to the public which may arise from the refusal to issue a writ of certiorari in this case does not provide a reason or basis for the issuance of the writ.

The refusal by this Court to issue a writ of certiorari in this case does not mean that, under the decision of the Court of Appeals, the Commission may not require ABW and WMA to serve the Route Extensions. There are several alternative courses of conduct available to the Commission herein. One alternative would be for the Commission merely to make the additional findings required by, and to comply with, Section 4(e) of the Compact. Or, alternatively, as the Record herein shows, the Commission could permit Transit to work out arrangements to provide such service as may be required (R. 638-45).

## II

## THE FINDING BY THE COURT OF APPEALS THAT THE COMMISSION FAILED TO ACT IN CONFORMITY WITH STATUTORY STANDARDS IS CORRECT

The Court of Appeals sets aside Commission Order No. 581 because the action of the Commission requiring ABW and WMA to serve the Route Extensions was not "taken in conformity with the statutory requirements and by reference to the statutory standards" (Petition, p. A8).

The Court of Appeals is correct in holding that the operating authority granted to ABW and WMA by the grandfather certificates is defined by Section 4(a) of the Compact pursuant to which such certificates were issued and that grandfather certificates are issued to permit only the continua-

tion of actual, and not potential, operations.[9] The Court properly finds that neither ABW nor WMA provided service over the Route Extensions on the effective date of the Compact. There is absolutely no authority for the Commission's allegations in the Petition that it is potential or authorized operations, and not actual service, which are the determinative factors in setting the scope of authority preserved by grandfather certificates.

The Court of Appeals is also correct in finding that the Commission, in issuing the grandfather certificates to ABW and WMA, did not purport to grant authority for any operations not actually conducted on the effective date of the Compact. In their applications for grandfather certificates, ABW and WMA sought certificates authorizing only "continuance of operations being conducted on the effective date of the Compact" (Ex. 88, R. 295). In the order issuing these grandfather certificates, the Commission defined the matters it considered with respect to such issuance as follows:

> "The only issues involved were whether or not the applications were timely filed and whether or not the applicants were *bona fide engaged* in transportation subject to this Act for which authority was sought." (emphasis added) (Ex. 88, R. 296).

Clearly, neither ABW nor WMA sought authority for operations not actually conducted on the effective date of the Compact and, in issuing the grandfather certificates, the Commission did not purport to grant any greater authority.

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[9] *United States v. Carolina Freight Carriers Corp., supra,* 315 U.S. at 480-81; *McDonald v. Thompson,* 305 U.S. 263, 266 (1938); *Holiday Tours, Inc. v. Washington Metropolitan Area Transit Comm'n,* 352 F.2d 672, 676 n. 5 (D.C. Cir. 1965); *Gadd v. Washington Metropolitan Area Transit Comm'n,* 347 F.2d 791, 792 n. 1 (D.C. Cir. 1965) (per curiam); *Crescent Express Lines, Inc. v. United States,* 49 F. Supp. 92, 94 (S.D. N.Y. 1943), *aff'd* 320 U.S. 401 (1943); *Moore v. United States,* 41 F. Supp. 786, 791 (D. Minn. 1941) (per curiam), *aff'd mem.,* 316 U.S. 642 (1942).

The Court of Appeals is also correct in finding that service by ABW and WMA over the Route Extensions would have an adverse financial impact upon Transit and that, consequently, Transit is entitled to the protection provided by Section 4(e) of the Compact (See pp. 12-13, *supra*).

Having found that the grandfather certificates do not authorize service by ABW and WMA over the Route Extensions and that such service would be competitively adverse to Transit, the Court of Appeals is correct in holding that the Commission was required to comply with Section 4(e) of the Compact in ordering ABW and WMA to serve the Route Extensions.

The Commission did argue that it need not comply with Section 4(e) of the Compact because its predecessor regulatory agencies, the ICC and the PUC, or the Joint Board, could have required ABW and WMA to serve the Route Extensions without making any findings of public convenience and necessity[10] (Commission Order No. 581, Petition, pp. A14-A17). In the first place, the Commission is wrong in that it could not require ABW and WMA to extend their service and serve the Route Extensions without complying with Section 4(e) of the Compact and Section 3 of the Franchise. Moreover, the Court of Appeals is correct in rejecting the Commission's argument and holding that regardless of the powers which the predecessor agencies had, the Commission's powers are limited to those granted by the Compact and the Franchise.

The decision by the Court of Appeals that the Commission failed to act in conformity with statutory requirements and standards in ordering ABW and WMA to serve the Route Extensions is clearly correct and supported by substantial

[10]The predecessor agencies did not, in fact, have such authority. *Oriole Motor Coach Co. v. Public Utils. Comm'n, supra; Capital Transit Co. v. Riley E. Elgen, supra;* District of Columbia Pub. Utils. Comm'n Order No. 3682, June 14, 1950 (Ex. 87, R. 264); District of Columbia Pub. Utils. Comm'n Order No. 3368, *supra.* See also *Capital Transit Co. v. Safeway Trails, Inc., supra.*

authority. There is, therefore, no reason for this Court to issue a writ of certiorari in this case to review the decision of the Court of Appeals.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit in this case should be denied.

Respectfully submitted,

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